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In The
Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-688

LOWELL SCHOOL DISTRICT NO. 71, Petitioner,

v.

DOROTHY KERR, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
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No.

LOWELL SCHOOL DISTRICT NO. 71, Petitioner

vs.

DOROTHY KERR, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Lowell School District No. 71 petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case on June 13, 1977.

OPINIONS BELOW

The opinions of the district court, printed in Appendix B hereto, are unreported. The opinion of the court of appeals, printed in Appendix A hereto, is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1977, *infra*, p. A-1. Petitioner filed a timely petition for rehearing on June 27, 1977, which was denied on August 16, 1977. On September 13, 1977, the court of appeals stayed its mandate as to petitioner provided that this petition for certiorari was filed on or before September 30, 1977. Its mandate has not yet issued as to the petitioner.

Jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Is a school district exempt from liability under 42 U.S.C. §1983 to a school teacher whose contract the district has declined to renew allegedly in violation of the teacher's First Amendment rights?

2. If so, does a claim for damages lie against a school district directly under the Fourteenth Amendment for an alleged violation of the teacher's First Amendment rights?

3. If such a claim can be stated, is an Oregon school district immune under the Eleventh Amendment from suit upon the claim in federal court?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 42 U.S.C. §1983 and its jurisdictional counterpart 28 U.S.C. §1343, 28 U.S.C. §1331 (a) and Or. Rev. Stat. §30.260, 30,265, 30.275, 30.300, 30.310 and §30.320. They are printed in Appendix C.

STATEMENT OF THE CASE

Respondent brought an action for damages against the petitioner, the superintendent of the school district and members of its board of directors. She alleged that petitioner declined to renew her teaching contract at the end of the 1971-1972 school year because she had been a member of a group of citizens who had circulated a newsletter about the district among local citizens and she had written a letter critical of the district which appeared in the local newspaper. She claimed that the district's decision violated her rights under the First, Ninth and Fourteenth Amendments to the United States Constitution.[1]

Her action against the petitioner was originally brought under 42 U.S.C. §1983, with federal jurisdiction invoked under 28 U.S.C. §1343. The district judge dismissed the action on the grounds that the petitioner is not a person subject to suit under §1983. Respondent did not challenge this ruling.

1. Respondent did not assert her Ninth Amendment rights at trial or on appeal. For that reason no further mention is made of them.

Respondent then amended her claim, contending that it arose directly under the First and Fourteenth Amendments, with federal jurisdiction based on 28 U.S.C. §1331. The district court again dismissed the action against petitioner on the following grounds: (1) it is not a person within §1983; (2) it is immune from suit in federal court under the Eleventh Amendment, so the court lacks jurisdiction under §1331; and (3) respondent's complaint failed to state a cause of action against the petitioner "under 42 U.S.C. §1983, 28 U.S.C. §1343, or 28 U.S.C. §1331". Appendix B, *infra*, p. B-2.

Respondent proceeded to trial against the remaining defendants. The district judge directed a verdict in their favor.

On appeal, the court below held both the dismissal of the claim against petitioner and the directed verdict in favor of the remaining defendants were erroneous and reversed. The court below subsequently denied the school district's petition for review of its holding on the jurisdictional issue and the availability of relief against a school district directly under the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS AS TO THE EXISTENCE OF A FEDERAL CAUSE OF ACTION FOR DAMAGES AGAINST SCHOOL DISTRICTS WHOSE AGENTS OR OFFICIALS, ACTING UNDER COLOR OF STATE LAW, ALLEGEDLY DEPRIVE OTHERS OF THEIR CONSTITUTIONAL RIGHTS.

Three questions were briefed extensively for the district court and the court below: (1) Was there federal question jurisdiction over respondent's claim against the petitioner? (2) Did respondent state a claim for which relief can be granted? (3) Is petitioner immune from suit for damages in federal court under the Eleventh Amendment? Respondent did not challenge the district judge's holding that her action may not be maintained against petitioner under 42 U.S.C. §1983. Therefore,

the parties concentrated on whether there was federal jurisdiction over respondent's action under 28 U.S.C. §1331 and, if so, whether respondent had stated a claim for relief against the school district directly under the Fourteenth Amendment.

The court held that petitioner is not "immune" from such a claim, "with jurisdiction under Title 28, §1331, and in Title 42 U.S.C. §1983." Appendix A, *infra*, p. A-4. The rationale of the holding appears to be that petitioner does not enjoy Eleventh Amendment immunity if a claim for damages can be stated against it over which there is federal jurisdiction. On the Eleventh Amendment issue, the court cited *Hutchison v. Lake Oswego School District No. 7*, 519 F.2d 961 (1975), *vacated on other grounds*, 429 U. S. 1033 (1977), and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U. S. 274 (1977). On the remaining issues, the court referred, without discussion, to its opinion in *Gray v. Union County Intermediate Education District*, 520 F.2d 803, 805 (9th Cir. 1975).

In *Gray*, plaintiff asserted federal jurisdiction under 28 U.S.C. §1343 and §1331. Jurisdiction exists under §1343 if defendant is a person subject to suit under 42 U.S.C. §1983. The court declined to rule on the question of whether an Oregon school district is such a person, finding federal jurisdiction based on §1331. Without further discussion, the court stated:

> "The 'person' requirements of §1983 do not apply to §1331, and hence political subdivisions can be sued. (Cit. om.)."

Id., at 805. The court in *Gray* was apparently not asked to decide whether the complaint stated a claim for which relief could be granted against the school district. To the extent that the passage quoted above purports to answer such a question it is dictum.

In *Mt. Healthy City School District Board of Education v. Doyle, supra*, 429 U. S. at 279, this court resolved the jurisdictional question, holding that where a complaint alleges facts satisfying the requirements of §1331 a federal court has jurisdiction over an action against a municipality or a school district

for an alleged deprivation of the plaintiff's constitutional rights by its agents or officials acting under color of state law, unless the claim appears to be immaterial and made just to obtain jurisdiction. Section 1331 is, however, merely a jurisdictional statute. It does not provide a substantive basis for relief.

A question left unanswered in *Mt. Healthy* but specifically reserved by the court is whether relief for deprivation of constitutional rights is available against a school district directly under the Fourteenth Amendment by analogy to the holding in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U. S. 388 (1971). In *Bivens* a damages remedy against federal officers was implied directly under the Fourth Amendment for an unconstitutional search. The issue presented here is whether *Bivens* justifies recognition of a damages remedy against a school district, for an alleged violation of First Amendment rights of a plaintiff, based directly on the Fourteenth Amendment.

This court reserved the issue in *Mt. Healthy* because the question was too important to decide on the basis of the record before it. The parties had not briefed the issue in the courts below, but raised it for the first time after certiorari had been granted and all briefs submitted. Here, by contrast, the issue was fully briefed by both parties in the district court and the court of appeals.

No court of appeals has yet ruled on the precise issue involved in *Mt. Healthy,* where the defendant against whom relief was sought was a school district. A concurring opinion in *Singleton v. Vance County Board of Education,* 501 F.2d 429 (4th Cir. 1974) (Winter, J., concurring and dissenting), would have approved *Bivens* in a damage suit against a school board by a non-renewed teacher. The Fifth Circuit approved a damages award against a school district for wrongful discharge, without mention of *Bivens,* in *Roane v. Callisburg Indep. School District,* 511 F.2d 633 (5th Cir. 1975).

District courts that have ruled on the issue, where the defendant was a school district or school board, have reached conflicting results. Compare *Weathers v. West Yuma County School District R-J-1,* 387 F. Supp. 552 (D. Colo. 1974), *aff'd*

on other grounds, 530 F.2d 1335 (10th Cir. 1976), holding that since a school district is not a person under 42 U.S.C. §1983 or §1985 a teacher whose contract was not renewed has no remedy against it for violation of his Fourteenth Amendment rights, regardless of the grounds of federal jurisdiction, with *Panzarella v. Boyle,* 406 F. Supp. 787, 791-793 (D.R.I. 1975), holding that the complaint of a student suspended by a public school committee, a political subdivision of the state under state statutes, stated a claim directly against the committee under the Fourteenth Amendment on the grounds that a *Bivens* action is not restricted to violations of the Fourth Amendment.

Lower federal court decisions have also split on the availability of a damages remedy against municipalities, local agencies and political subdivisions of a state other than school districts. Some have extended *Bivens* to claims brought against such defendants under the Fourteenth Amendment,[2] while others have refused to recognize this remedy out of concern for federalism[3] or the exclusion of municipalities from §1983[4]. Some courts

2. *Reeves v. City of Jackson,* 532 F.2d 491, 495 (5th Cir. 1976); *Hanna v. Drobnick,* 514 F.2d 393, 398 (6th Cir. 1976) (dictum); *Hostrop v. Board of Junior College District No.* 515, 523 F.2d 569 (7th Cir. 1975); *Donoghue v. Behler,* 429 F. Supp. 403 (D.N.J. 1977); *Redding v. Medica,* 402 F.Supp. 1260 (W. D. Pa. 1975); *Barszcz v. Board of Trustees of Community College,* 400 F. Supp. 675, 676 (N.D. Ill. (1975); *Williams v. Brown,* 398 F.Supp. 155, 156 (N.D. Ill. 1975); *Patterson v. City of Chester,* 389 F.Supp. 1093, 1095-1096 (E.D. Pa. 1975); *Stephens v. City of Plano,* 375 F.Supp. 985, 986 (E.D. Tex. 1974); *Dahl v. City of Palo Alto,* 372 F.Supp. 647 (N.D. Cal. 1974).

3. *Crosley v. Davis,* 426 F.Supp. 389 (E.D. Pa. 1977); *Jamison v. McCurrie,* 388 F.Supp. 990, 992 (N.D. Ill. 1975); *Perzanowski v. Salvio,* 369 F.Supp. 223, 230 (D. Conn. 1974).

4. *Bunting v. City of Colombia,* 423 F.Supp. 446 (D.S.C. 1975); *Livingood v. Townsend,* 422 F.Supp. 24 (D. Minn. 1976); *Pitrone v. Mercadante,* 420 F.Supp. 1384 (E.D. Pa. 1976); *Perry v. Linke,* 394 F.Supp. 323, 324-326 (N.D. Ohio 1974); *Smetanka v. Borough of Ambridge,* 378 F.Supp.

have expressly declined to decide the issue[5]. These conflicts will not be resolved until the court addresses the issues reserved in *Mt. Healthy City School District Board of Education v. Doyle*, *supra*.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE ADMINISTRATION OF 42 U.S.C. §1983 AND THE IMPOSITION OF LIABILITY UPON SCHOOL DISTRICTS IN CIVIL RIGHTS CASES DRECTLY UNDER THE CONSTITUTION.

The opinion below reflects a common response to attempts to state a damages claim against school districts, municipal corporations and other state political subdivisions for alleged deprivations of constitutional rights. This court has held so far that such a cause of action will not lie under 42 U.S.C. §1983 against a municipal corporation, *Monroe v. Pape*, 365 U. S. 167 (1961), or a county, *Moor v. County of Alameda*, 411 U. S. 693 (1973). Lower courts have added a wide variety of local government bodies to the list of exempt defendants.[6]

(Cont.)
1366, 1378 (W.D. Pa. 1974); *Payne v. Mertens*, 343 F. Supp. 1355, 1358 (N.D. Cal. 1972).

5. *Fine v. City of New York*, 529 F.2d 70, 76 (2d Cir. 1975); *Brault v. Town of Milton*, 527 F.2d 730 (2d Cir. 1975) (en banc); *Aldinger v. Howard*, 513 F.2d 1257, 1259 n.1 (9th Cir. 1975), *aff'd*, 427 U. S. (1976); *Apton v. Wilson*, 506 F.2d 83, 86 (D.C. Cir. 1974).

6. *School boards*: *Monell v. Dept. of Social Services of City of New York*, 532 F.2d 259, 262-264 (2d Cir. 1976); *Burt v. Board of Trustees of Edgefield County School District*, 521 F.2d 1201, 1205 (4th Cir. 1975); *Adkins v. Duval County School Board*, 511 F.2d 690 (5th Cir. 1975); *Mims v. Board of Education of City of Chicago*, 523 F.2d 711, 716 (7th Cir. 1975). But see *Aurora Educ. Ass'n. East v. Board of Education*, 490 F.2d 431, 435 (7th Cir. 1973), *cert. denied*, 416 U. S. 985 (1974); and *Keckeisen v. Indep. School District 612*, 509 F.2d 1062, 1065 (8th Cir. 1975), *cert. denied*, 423 U. S. 833 (1975).

Since efforts to state such a claim against local government bodies directly under the constitution are frequent occurrences, litigants and lower courts urgently need the assistance of this court. Among unanswered questions are:

1. Is a school district a person under §1983?

The primary reason for excluding municipalities and counties from §1983 was "legislative concern as to Congress' constitutional power to impose liability on political subdivisions of the States." *Moor v. County of Alameda*, *supra*, 411 U. S. at 709. That concern was manifested by the House of Representative's rejection of a proposed amendment to the 1871 Civil Rights Act which would have made counties, towns and parishes strictly liable in damages for injuries suffered by reason of unconstitutional conduct within their boundaries, *Monroe v. Pape*, *supra*, 365 U. S. at 187-190. In the absence of a decision by this court on the point, most lower courts have concluded that school districts fall within the scope of state political subdivisions which Congress intended to exclude from liability under §1983.

(Cont.)
State colleges and universities: *Blanton v. State Univ. of New York*, 489 F.2d 377, 382 (2d Cir. 1973); *Skehan v. Board of Trustees*, 501 F.2d 31, 44 (3rd Cir. 1974), *vacated on other grounds*, 421 U. S. 983 (1975); and *Prostrollo v. Univ. of South Dakota* 507 F.2d 775 (8th Cir. 1974), *cert. denied*, 421 U. S. 952 (1975).

State governments and arms thereof: *Cheramie v. Tucker*, 493 F.2d 586 (5th Cir. 1974), *cert. denied*, 419 U. S. 868 (1974); *Williford v. California*, 352 F.2d 474, 476 (9th Cir. 1965).

Sanitary commission: *Bennett v. Gravelle*, 323 F.Supp. 203, 210-211 (D.Md. 1971), *aff'd*, 451 F.2d 1011 (4th Cir. 1971), *cert. dismissed*, 407 U. S. 917 (1972).

See Note, *The Supreme Court*, 1972 Term, 87 Harv. L. Rev. 1, 258 (1973), which states, "There seems little doubt that the reasoning of *Bruno* [*City of Kenosha v. Bruno*, 412 U. S. 507 (1973)] is not limited to municipalities but applies to all agencies of state and local government."

2. If Congress intended school districts to be excluded from liability under §1983, to what extent does that prevent the judiciary from implying a damages remedy against them directly from the Fourteenth Amendment?

In *Bivens*, the court recognized a cause of action based on the Fourth Amendment in a situation where, in the absence of such relief, the plaintiff would have had no federal remedy. There was no remedy because §1983 does not apply to actions under color of federal law and at that time the Federal Tort Claims Act did not provide a remedy against the United States for the wrongful acts of its law enforcement officers. The court indicated that if there was "another remedy" equally effective in the view of Congress or "special factors counseling hesitation in the absence of affirmative action by Congress," that would weigh against implying a cause of action directly from the Constitution. 403 U. S. at 396-397.

In §1983, Congress provided such a remedy against individuals acting under color of state law. This fact has led one district judge to conclude that a damages remedy should not be implied against a municipality because Congress did not want state political subdivisions to be subject to damages for civil rights violations. See *Pitrone v. Mercadante*, 420 F.Supp. 1384 (E.D. Pa. 1976) (Ditter, J.). Another judge of the same district has reached a contrary conclusion, however. The legislative history in *Monroe*, *Moor* and *City of Kenosha v. Bruno* indicates not that Congress intended to prevent municipalities from being held liable altogether, but only to exclude them from the definition of "person" in §1983 because of doubts about its power to impose liability upon them. *Crosley v. Davis*, 426 F. Supp. 389, 392-393 (E.D. Pa. 1977) (Becker, J.).[7]

The existence of a conflict within the same district con-

7. Judge Becker ultimately held that a cause of action should not be implied against a municipality directly from the Constitution, because it would be neither necessary nor appropriate. He reached this conclusion after a discussion of the position taken in Note, *Damage Remedies against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922 (1976).

cerning the scope of congressional intent with regard to §1983 and the power of the courts to act outside the statutory scheme dramatically underscores the need for this court to decide whether congressional intent regarding §1983 bars implication of a federal damages remedy from the Constitution against a state political subdivision exempt from liability under §1983.

3. If congressional intent regarding §1983 does not preclude the courts from acting outside §1983, should the court imply a damages remedy against school districts directly from the Constitution?

In *Bivens*, Justice Harlan, concurring, suggested that the court should exercise its power to imply a damages remedy only if the remedy were necessary or appropriate. 403 U. S. at 407. The appropriateness of such a remedy has been the subject of considerable discussion among commentators.[8] One court, applying these criteria, weighed Congress' decision not to extend §1983 liability to municipalities, the relative positions of Congress and the judiciary to declare the need for municipal liability for violations of civil rights, the existence of countervailing factors against municipal liability, and Congress' superior position to balance the need for municipal liability against such countervailing factors. On the basis of these considerations, the court held it was inappropriate to imply a damages remedy against municipalities. *Crosley v. Davis, supra*, 389 F.Supp. 395.

3. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE OREGON SUPREME COURT REGARDING AN OREGON SCHOOL DISTRICT'S IMMUNITY FROM LIABILITY.

8. See Note, *Municipal Liability in Damages for Violations of Constitutional Rights — Fashioning a Cause of Action Directly from the Constitution* — Brault v. Town of Milton, 7 Conn. L. Rev. 552 (1975); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922 (1976); Hundt, *Suing Municipalities Directly under the Fourteenth Amendment*, 70 Nw. U. L. Rev. 770 (1975); and Comment, *Implying a Damage Remedy against Municipalities Directly under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the* Bivens *Doctrine*, 36 Md. L. Rev. 123 (1976).

The court below rejected petitioner's contention that it was immune from suit in federal court under the Eleventh Amendment. The primary question here is whether the petitioner is to be treated as an arm of the state, hence within the scope of the state's Eleventh Amendment immunity, or as a municipal corporation or other political subdivision to which such immunity does not apply. This will depend ". . . at least in part on the nature of the entity created by state law." *Mt. Healthy City School District Board of Education v. Doyle, supra,* 429 U. S. at 280.

In *Moor v. County of Alameda, supra,* a county contended that it was an arm of the state rather than a political subdivision or municipal corporation and hence, like a state, it was not a citizen for diversity purposes. It relied upon a provision of the California Constitution. This court, characterizing the cited provision as a generalization, looked beyond it to a number of California statutes setting up capacities and powers of counties under California law and indicating their independent status. The court also relied on "the clearest indication possible from California's Supreme Court of the status of California's counties," citing a footnote in *People ex rel Younger v. County of El Dorado,* 5 Cal. 3d 480, 487 P.2d 1193 (1971), to the effect that counties are public or quasi-public corporations.

Likewise, in determining whether for Eleventh Amendment purposes an Oregon school district is an arm of the state or a political subdivision, not only should relevant portions of state statutes be examined but also the highest state court's own treatment of the issue.

The court below, in resolving this issue against the petitioner, relied on *Hutchison v. Lake Oswego School District No. 7, supra.* In that case, after examining relevant Oregon statutes in effect when the present case was filed, the court held that an Oregon school district is more like a municipal corporation than an arm of the state. 519 F.2d at 966-968. That decision, as well as the decision below, conflicts with a provision of the Oregon Constitution as construed by the Oregon Supreme Court.

Article IV, §24, of the Oregon Constitution provides:

> "Provision may be made by general law, for bringing suit against the State, as to all liability originating after, or existing at the time of the adoption of this constitution, but no special act authorizeing (sic) such suit to be brought, or making compensation to any person claiming damages against the State, shall ever be passed."

In an unbroken string of cases, the Oregon Supreme Court has held that a school district is subject to this principle of immunity. See *Vendrell v. School District No. 26C,* 226 Or. 263, 360 P.2d 282 (1961), and cases collected there. In *Vendrell* the Oregon Supreme Court reviewed cases from other jurisdictions in which the doctrine of sovereign immunity was eliminated in application to school districts. After noting that it would be desirable to eliminate the doctrine in Oregon, the court stated that it was constrained by the Oregon Constitution.

> ". . . [I]t is apparent that the doctrine of sovereign immunity exists in this state, not as a creation of the courts, but as a constitutional principle chosen by the people and which is subject to change only by general law . . ."

Id., at 278-279.

Under general law in effect in 1972, when respondent's claim arose, and in 1974, the time of trial, an Oregon school district had some of the same powers and capacities which an Ohio school district has under Ohio law and which led this court to conclude in *Mt. Healthy* that an Ohio school district is not an arm of the state for Eleventh Amendment purposes. Construing that law, the Oregon Supreme Court expressly declared school districts to be an arm of the state, however.

Under the Oregon statute governing tort actions against public bodies, the definition of "public body" expressly included the state, state agencies and school districts. Or. Rev. Stat. §30.250. Immunity was waived for the torts of public bodies committed by agents acting within the scope of their employment or duties, but not for claims based on the exercise or performance of a discretionary function or duty, such as deciding not to renew a teacher's contract. Or. Rev. Stat. §30.265 (1969).

In 1975 the act governing tort actions against public bodies was amended.[9] In particular the definitions were expanded and clarified. A distinction was drawn within the class of public bodies between the state on one hand and local public bodies on the other, and school districts were reclassified as local public bodies. Furthermore, tort liability was defined expressly to include any violation of 42 U.S.C. §1983. Thus the legislature in 1975 expressly waived sovereign immunity for §1983 "torts" committed by school districts. The legislature provided, however, that these amendments did not apply to any claim against any local public body which arose prior to December 31, 1975. Claims arising before that date were declared subject to all the restrictions that existed prior to the amendment. Or. Rev. Stat. §30.265(6) (1975). Thus, under Oregon law applicable to the present case, school districts may not be sued for violating a person's civil rights by analogy to 42 U.S.C. §1983 in federal courts.

The decision of the court below conflicts with applicable Oregon statutes as construed under the Oregon Constitution by Oregon's Supreme Court. Under Oregon law petitioner was an arm of the state immune from liability for torts committed in the exercise of discretionary functions or duties, such as hiring or discharging teaching staff. Certiorari should be granted to resolve this conflict.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

LARRY O. GILDEA
Attorney for Petitioner

J. P. GRAFF
Of Counsel

November 8, 1977.

9. Or. Laws ch. 609, §12 (1975).

APPENDIX A

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

DOROTHY KERR,
Plaintiff-Appellant,

v.

LOWELL SCHOOL DISTRICT NO. 71, et al,
Defendants-Appellees.

No. CA 74-3170
MEMORANDUM

Appeal from the United States
District Court for the District of Oregon

Before: DUNIWAY and WALLACE, Circuit Judges
and WHELAN, *District Judge

Plaintiff-Appellant appeals from a judgment that she take nothing and dismissing her action. She assigned two errors. The first is the making of an order dismissing that action as against Defendant-Appellee Lowell School District No. 71 (hereafter School District). The second is the granting of a directed verdict in favor of all the Defendants-Appellees and against Plaintiff-Appellant at the close of the presentation of the Plaintiff-Appellant's case in a jury trial.

The individual Defendants-Appellees include the five members of the School Board of School District as individuals and as members of the Board, and the Superintendent of School District in his individual and official capacities.

The relevant facts pertinent to this appeal follow. Plaintiff-Appellant had been a teacher employed by School District in various teaching capacities for the period commencing in 1965 until the end of the 1971-72 school year (except for one year

* Honorable Francis C. Whelan, United States District Judge, Central District of California, sitting by designation.

in 1967-68 when she took a leave of absence to return to college to secure a Master's Degree). Her teaching contract was not renewed for the school year 1972-73. During the fall and through the end of 1971, Plaintiff-Appellant, with others, circulated a "fact sheet" and a questionnaire concerning the comparison of School District with five other school districts in certain categories. The fact sheet gave certain data and the questionnaire requested answers to questions. In December 1971 Plaintiff-Appellant wrote a letter to the Editor of a local newspaper which was critical in general of the operation of School District. On February 29, 1972, the principal of Plaintiff-Appellant's school supplied her with a written teacher evaluation on which he had rated her satisfactory on all items relating to "teaching performance", but had rated her less favorably in some items relating to "personal qualities" and "professional relationship". The school principal wrote with respect to the items rated less favorably, "This evaluation is based on the multitude of activities this year; participation in the Lowell Taxpayers circular, letter to Editor, and general attitude around school." A few days later the school principal met with Defendant-Appellee School Superintendent Harmon and the two went over the teacher evaluations and thereupon they jointly agreed to recommend nonrenewal of Plaintiff-Appellant's contract. On March 13, 1972, the School Board met and accepted such recommendation. Plaintiff-Appellant received notification of her nonrenewal on March 14, 1972. She thereupon requested a hearing before the Board and a statement of the reasons for her nonrenewal. The hearing was held on May 16, 1972; the day before the hearing Plaintiff-Appellant was given a statement listing the reasons for nonrenewal. Such statement stated as reasons for nonrenewal:

1. She has not followed adopted grievance procedures or regular administrative channels in pursuing grievances or complaints.

2. She has not been candid with her principal.

3. She maintains a hostile and disruptive attitude with the administration which has made communication virtually impossible.

4. The administration has lost confidence in her as a professional teacher because of the items identified in her evaluations.

At the hearing on May 16, 1972, the school principal testified that the distribution of the fact sheet and questionnaire and the letter to the Editor and general attitude around school were factors in the nonrenewal; the School Superintendent testified that the bases for nonrenewal were Plaintiff-Appellant's participation in the questionnaire matter and in the letter to the Editor. The School Board members testified they took the position that Plaintiff-Appellant should not be renewed based upon the recommendation made by the School Superintendent and school principal. After the hearing the School Board affirmed its prior decision not to renew Plaintiff-Appellant's teaching contract.

After the dismissal of School District from the action and after the order of the District Court directing a verdict in favor of all of the individual Defendants-Appellees, this Court in other cases made two rulings which are dispositive of this appeal. Those two rulings compel the reversal on this appeal of the order dismissing the action as to the Defendant-Appellee School District and the reversal of the order of the District Court granting the directed verdict in favor of all of the individual Defendants-Appellees.

Our Court in *Hutchison v. Lake Oswego School District No. 7*, 519 F.2d 9761 [sic] (1975) (vacated on other grounds).... U. S. ..... (1977), held that a money judgment for a past wrongful act could be imposed against an Oregon School District and that the Eleventh Amendment does not prohibit such money judgment. Our Court in so holding pointed out that such a judgment against an Oregon School District imposed no liability on the part of the State of Oregon to pay any part of such judgment for the reason that an Oregon School District has the power to sue and be sued and the power to tax and that the only obligation of the State of Oregon to an Oregon School District is the obligation to pay to the district an amount based upon the number of resident students and that such amount may not be an offset to the school district's own tax levy. In the case now

before us we are concerned with an Oregon School District. Plaintiff-Appellant asserts her claim for recovery against School District under the Fourteenth Amendment for violation of her First Amendment rights, with jurisdicion under Title 28 U.S.C. §1331, and in Title 42, U.S.C. §1983. School District is not immune from such an action. *Mt. Healthy City School District Board of Education v. Doyle,* .... U. S. ..... (No. 75-1278, Jan. 11, 1977), part III of the opinion, pp ..... to ..... (slip op., pp 5-6). *Gray v. Union County Intermediate Education District,* 520 F.2d 803, (9th Cir. 1975). Under the doctrines of *Hutchison* and *Gray,* the trial judge erred in dismissing the action against School District.

In *Gray, supra,* this Court at page 806 of the opinion stated, "a decision to terminate employment of a teacher which is only *partially* in retaliation for the exercise of a constitutional right is unlawful" (citing authorities). In *Mt. Healthy City School District, supra,* the Court stated the following test governing the fact finding in such a case as this:

> Initially, in this case, burden was properly placed upon respondent (teacher) to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" – or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. (footnote omitted) (....U. S. .....; slip op. at 12).

However, in this case the determination as to the reasons for nonrenewal of a teacher's contract and of the intent and motivation of the members of the School Board and other school officials involved must be determined by the trier of fact. In the instant case, Plaintiff-Appellant produced evidence at trial which if viewed in the most favorable light to her might reasonably support an inference that her nonrenewal was based at least in part upon her exercise of free speech. Under the *Mt. Healthy* test, this shifted to Defendants-Appellees the burden of showing that they would have reached the same decision as to Plaintiff-Appellant's reemployment even in the absence of the protected conduct.

While it is true that individual members of the School Board and the Superintendent of Schools are protected by a qualified "good faith" immunity, it is the existence of reasonable grounds for their belief formed at the time and in light of all of the circumstances coupled with their good faith belief that would afford them qualified immunity, provided, of course, that such grounds and such good faith belief existed. *See Scheuer v. Rhodes,* 416 U. S. 232, 247-248 (1974). The trier of fact, here the jury, must determine not only the existence or nonexistence of such grounds, but also the issue of good faith belief. Further, in *Wood v. Strickland,* 420 U. S. 308 at 321 (1975), the Supreme Court stated with respect to a school board member: "The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice". The same rule would apply to the constitutional rights of a teacher. It was therefore error for the trial judge to direct a verdict in favor of the individual School Board members and Superintendent of Schools.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

DOROTHY KERR Plaintiff-Appellant, vs. RAY CAMPBELL, ROBERT C. MOTSINGER, LARRY WALSCH, Defendants-Appellees.	)	Case No. 74-3170 D.C. CV-72-1017

Appeal from the United States District Court for the District of Oregon.

This case came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Costs in this court in favor of the Appellant, and against the Appellees.

40 Briefs $190.40

Filed and entered June 13, 1977.

APPENDIX B

1. Opinion and order granting petitioner's motion to dismiss.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DOROTHY KERR, Plaintiff, vs. LOWELL SCHOOL DISTRICT 71, et al., Defendants.	)	Civil No. 72-1017 OPINION

SKOPIL, Judge:

Plaintiff seeks damages for deprivation of rights guaranteed her by the United States Constitution. Plaintiff also seeks a permanent injunction against all defendants, and those acting in concert with them or under their direction, enjoining them from interfering with plaintiff's rights, and the rights of others similarly situated, of freedom of speech and association. Plaintiff also seeks attorneys fees.

Jurisdiction is asserted under 42 U.S.C. §1983, 28 U.S.C. §1343, and the First, Ninth, and Fourteenth Amendments to the United States Constitution.

The mater is now before he Court on the following motions of defendants:

1) To dismiss defendant Lowell School District 71 for lack of subject matter jurisdiction.

2) To dismiss defendants Harmon, Campbell, Motsinger, Walsh, Rice, and McCurdy for lack of subject matter jurisdiction and failure to state a claim.

3) To determine the sufficiency of plaintiff's answers to defendants' requests for admissions.

4) To order requests numbered 9, 10, and 12 deemed as admitted on the grounds that the answers given are sham and not responsive to the requests.

The action against the Lowell School District 71 must be dismissed. The school district is a municipal corporation and not a "person" under Section 1983 for purposes of either equitable relief or damages. *City of Kenosha v. Bruno*, ... U. S. ....., 37 L.ed.2d 109, 116 (1973); *Vanderzanden v. Lowell School District No. 71*, Civil No. 72-377 (D. Or. Sept. 5, 1973).

Plaintiff also contends that the Court has jurisdiction under 28 U.S.C. §1331 because her claim arises under the Constitution of the United States. The school district, however, is immune from suit under that statute. A state cannot be sued unless it expressly waives its Eleventh Amendment sovereign immunity. A school district is a political subdivision of the state. *Vendrell v. School District No. 26C, Malheur County*, 226 Or. 263, 360 P.2d 282 (1961). Plaintiff contends that the State of Oregon and defendant school district have waived their immunity. But ORS 30.320, the section which applies to this action, only waives the sovereign's immunity from suit in its own courts and does not waive the State's immunity under the Eleventh Amendment. *Waggoner v. Linn County School District No. 42*, Civil No. 73-251 (D. Or. Aug. 16, 1973); *DeLong Corp. v. Oregon State Highway Commission*, 233 F.Supp. 7 (D. Or. 1964).

Plaintiff has failed to state a cause of action against the school district under 42 U.S.C. §1983, 28 U.S.C. §1343, or 28 U.S.C. §1331.

Defendants further contend that the Court has no jurisdiction over the individual members of the school board. They argue that the members of the board were acting in their official capacities and therefore are not "persons" under Section §1983. *Bennett v. Gravelle*, 323 F.Supp. 203 (D. Me. 1971). Defendants rely on Agreed Fact No. 6 in the Pretrial Order, which states as follows:

> "At all times material herein, defendants Ray Campbell, Robert C. Mossinger, Larry Walsh, Maylene Rice, Ralph E. McCurdy, and Richard C. Harmon were acting in their official representative capacities."

Despite Agreed Fact No. 6, plaintiff has made it clear in her Amended Complaint and in the Pretrial Order (Plaintiff's

Contentions of Fact No. 1) that she contends the board members were acting in their individual capacities as well as in their official capacities. Therefore, even if plaintiff would be precluded from bringing this action against defendants in their official capacities, she has alleged a cause of action upon which relief can be granted.

Defendant Harmon, Superintendent of Lowell School District 71, moves for an Order of Dismissal on the ground that the Complaint fails to state a claim of relief against him. He contends that he had no statutory power or authority to either employ or dismiss the plaintiff and therefore did not personally participate in the deprivation of plaintiff's rights. I decline to rule on Harmon's motion at this time.

Finally, defendants move for a determination pursuant to Fed. R. Civ. P. 36 of the sufficiency of plaintiff's answers to defendants' requests for admissions. Defendants seek reasonable attorneys fees incurred in filing this motion pursuant to Fed. R. Civ. P. 37(a) (4). I find that plaintiff's responses to requests 9, 10, and 12 are insufficient because they fail to state that plaintiff has made reasonable inquiry and that information known or readily obtainable by her is insufficient to enable her to admit or deny the request for admission. Fed. R. Civ. P. 36(a). Defendants shall supply plaintiff by Wednesday, March 20, 1974, with the necessary documents to enable plaintiff to respond more precisely to defendants' requests. Plaintiff shall have until Friday, March 22, 1974, to admit or deny the matters set forth in requests 9, 10, and 12.

Plaintiff's responses to defendants' other requests for admission are sufficient.

I find that the circumstances surrounding the inadequacy of plaintiff's responses would make an award of expenses for this motion unjust. Defendants are not, therefore, entitled to attorneys fees.

An Order shall be entered consistent with this Opinion.

DATED this 15th day of March, 1974.

/s/ Otto R. Skopil, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DOROTHY KERR,
Plaintiff,

vs.

LOWELL SCHOOL DISTRICT 71, et al.,
Defendants.

Civil No. 72-1017
ORDER

In accordance with the Opinion entered simultaneously herewith, it is

ORDERED as follows:

1) The action against the Lowell School District 71 (Lane County School District No. 71) is dismissed;

2) Defendants' motion to dismiss the individual members of the school board is denied; and

3) Defendants shall supply plaintiff by March 20, 1974, with the necessary documents to enable plaintiff to admit or deny the matters contained in defendants' requests for admissions numbered 9, 10, and 12; and plaintiff shall admit or deny the matters contained in those requests by March 22, 1974.

DATED this 15th day of March, 1974.

/s/ Otto R. Skopil, Jr.
United States District Judge

2. Order directing verdict in favor of individual defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DOROTHY KERR,
Plaintiff,

vs.

LOWELL SCHOOL DISTRICT NO. 71, et al.,
Defendants.

No. 72-1017
ORDER

This case came on for trial on May 28, 1974. The case was previously dismissed as to defendant Lane County School District No. 71. The trial proceeded between plaintiff and the other named defendants.

Testimony and evidence were received from both parties. After plaintiff rested, defendants moved for directed verdict in favor of all defendants.

I granted defendants' motion for the following reasons:

1) The defendant Richard L. Harmon, Superintendent of the defendant school district, had no statutory power or authority to renew or nonrenew plaintiff. ORS 342.505. Plaintiff was nonrenewed by action of the Board of Directors of the school district. Superintendent Harmon's recommendation to the school board did not deprive plaintiff of any right, privilege, or immunity secured to her by the Constitution and the laws of the United States.

Superintendent Harmon was required by board policy to recommend to the school board the renewal or nonrenewal of all teachers. There is no evidence that Suprintendent Harmon was acting other than in his official capacity as superintendent of the school district.

There is no evidence that Superintendent Harmon discriminated against plaintiff. His recommendation for nonrenewal was not based upon plaintiff's activities in the Lowell Educa-

tion Association or as a member of the teachers' negotiating team. Superintendent Harmon did not conspire with the school board or any member thereof to deprive plaintiff of her constitutional rights.

A jury verdict against Richard L. Harmon could not be sustained. His motion for a directed verdict must be allowed.

2) The remaining defendants, Ray Campbell, Robert C. Motsinger, Larry Walsh, Maylene Rice, and Ralph E. McCurdy were, at the time of plaintiff's nonrenewal, the members of the Board of Directors of the defendant school district. The action taken to nonrenew plaintiff was official board action taken at a duly constituted board meeting. Plaintiff has not challenged this fact. Pursuant to plaintiff's request, the board granted plaintiff a hearing. Plaintiff, with counsel, was given an opportunity to and did cross examine members of the administration and present evidence on her behalf to the board.

The board made its decision to nonrenew plaintiff and upheld that action following plaintiff's hearing. It appears that plaintiff participated in the preparation and distribution of misleading information to the patrons of the school district. Plaintiff, when asked by her principal, failed and refused to disclose information about her involvement in the preparation and distribution of this information. It was impossible for the school's administration – particularly the elementary school principal – to work with plaintiff as a teacher. Plaintiff did not follow normal administrative channels and grievance procedures in pursuing her complaints and criticism of school policies or administrative actions. The information before the board was sufficient to support plaintiff's nonrenewal.

The record is void of any evidence that the school board's decision to nonrenew plaintiff's contract was based upon her activities in the Lowell Education Association or because of her activities as spokesman of the teachers' negotiating team. The board members, either individually or as a board, did not discriminate against plaintiff in nonrenewing her teaching contract.

The board, in making its decision to nonrenew plaintiff, was exercising a discretionary function required of it by law. The

board members acted in their official capacity as members of the Board of Directors.

A jury verdict against these defendants could not be sustained. Their motion for a directed verdict must be allowed. It is, therefore, hereby

ORDERED that defendants' motion for a directed verdict be and the same hereby is allowed as to each defendant.

Dated this 18th day of June, 1974.

/s/ Otto R. Skopil, Jr.

United States District Judge

3. Judgment on order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DOROTHY KERR,
Plaintiff,

vs.

LOWELL SCHOOL DISTRICT NO. 71, et al.,
Defendants.

CIV 72-1017
JUDGMENT

Based upon the Order filed contemporaneously herewith.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing and the case be and it is hereby dismissed.

DATED this 19th day of June, 1974.

Robert M. Christ, Clerk

APPENDIX C

Statutory provisions involved.

28 U.S.C. §1331 (a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the constitution, laws, or treaties of the United States."

28 U.S.C. §1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

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(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1983 provides:

"Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The following provisions of Oregon Revised Statutes, which were in effect when the cause of action arose and the complaint filed, are also relevant.

"30.260 *Definitions for 30.260 to 30.300.* As used in ORS 30.260 to 30.300, unless the context requires otherwise:

(1) 'Governing body' means the group or officer in which the controlling authority of any public body is vested.

(2) 'Public body' means the state and any department, agency, board or commission of the state, any city, county, school district or other political subdivision or municipal or public corporation in any instrumentality thereof."

"30.265 *Scope of liability of public body for torts.* (1) Subject to the limitations of 30.260 to 30.300, every public body is liable for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental proprietary function.

(2) Every public body is immune from liability for:

(a) Any claim for injury to . . . any person . . . resulting from an act or omission of an officer, employe or agent of a public body when such officer, employe or agent is immune from liability.

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(d) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

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(3) Neither a public body nor its officers, employees and agents acting within the scope of their employment or duties are liable for injury or damage:

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(b) Because of an act done or omitted under apparent authority of the law, resolution, rule or regulation which is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice."

"30.275 *Content of notice of claim; who may present claim; time of notice; time of action.* (1) Every person who claims damages from a public body for or on account of any loss or injury within the scope of ORS 30.260 to 30.300 shall cause to be presented to the public body within 180 days after the alleged loss or injury a written notice stating the time, place and circumstances thereof, and the amount of compensation or other relief demanded . . .

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(3) No actions will be maintained unless such notice has been given and unless the action is commenced within two years after the date of such accident are all current."

"30.300 *ORS 30.260 to 30.300 exclusive.* ORS 30.260 to 30.300 is exclusive and supersedes all home charter provisions and conflicting laws and ordinances on the same subject."

"30.310 *Actions and suits by governmental units.* A suit or action may be maintained by the State of Oregon or any county, incorporated city, school district or other public corporation of like character in this state, in its corporate name, upon a cause of suit or action accruing to it in its corporate character, and not otherwise, in the following cases:

(1) Upon a contract made with a public corporation.

(2) Upon a liability prescribed by law in favor of the public corporation.

(3) To recover a penalty or forfeiture given to the public corporation.

(4) To recover damages for injury to the corporate rights or property of the public corporation."

"30.320 *Contract and other actions in suits against governmental units.* A suit or action may be maintained against any county and against the State of Oregon by and through and in the name of the appropriate state agency upon a contract made by the county in its corporate character, or made by such agency and within the scope of its authority; provided, however, that no suit or action may be maintained against any county or the State of Oregon upon a contract relating to the care and maintenance of an inmate or patient of any county or state institution. An action or suit may be maintained against any other public corporation mentioned in ORS 30.310 for an injury to the rights of the plaintiff arising from some act or omission of such other public corporation within the scope of its authority. An action may be maintained against any governmental unit mentioned in ORS 30.310 for liability in tort only as provided in ORS 30.260 to 30.300."

Supreme Court, U. S.
FILED
FEB 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-688

LOWELL SCHOOL DISTRICT No. 71,

Petitioner.

v.

DOROTHY KERR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE

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LOWELL SCHOOL DISTRICT No. 71,

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v.

DOROTHY KERR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

This brief is filed pursuant to the Court's direction that a response be filed on or before February 8, 1978. Respondent believes that this case does not warrant this Court's plenary consideration, and that the petition for certiorari should be denied.

INTRODUCTION

Although the petition for certiorari states three "questions presented," a close analysis of the petition in light of the proceedings below makes clear that there are only two issues presented:

(1) Whether the Fourteenth Amendment creates a cause of action for monetary relief against a school district for violating a teacher's First Amendment rights, maintainable under 28 U.S.C. § 1331, irrespective of whether the school district is a "person" within the meaning of 42 U.S.C. § 1983.

(2) Whether Oregon school districts enjoy Eleventh Amendment immunity.[1]

As we show in Part I herein, this is neither the right case nor the right time for the Court to address the "Fourteenth Amendment cause of action" issue. (We also show in Part I that there is no reason to "hold" the petition on this issue pending decision in *Monell* v. *Department of Social Services*, No. 75-1914.)

In Part II, we show that the court of appeals' holding on the Eleventh Amendment issue conforms fully to this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and does not merit this Court's attention.

ARGUMENT

I. The "Fourteenth Amendment Cause of Action" Issue

A. *The Court Should Not Grant Certiorari in This Case to Decide the Issue.*

This Court stated in *Mt. Healthy, supra*, that the question whether a cause of action exists under the Fourteenth Amendment which is not subject to the limitations of § 1983 is an "extremely important" one. 429 U.S. at 278. But the Court did not decide that question in *Mt. Healthy*, and

[1] The third issue stated in the petition is whether school districts are "persons" suable under § 1983. The district court held that they are not, and plaintiff did not appeal that ruling. Thus, the issue was not decided below and is not here.

neither should it do so here. As we show below: First, it is not clear whether either of the courts below considered or ruled on the issue. Second, now is not the appropriate time for this court to consider the issue: (a) the lower courts have only begun the process of unearthing and analyzing the wealth of materials that potentially bear on the issue's resolution; and (b) Congress presently is considering legislation which, if enacted, would render the issue of no practical significance. Third, the issue is brought here at an interlocutory stage of this case and may well be of no practical significance even to the parties herein.

1. *It Is Not Clear Whether Either of the Courts Below Considered or Ruled on the Issue.*

This action was brought against the School District as an entity, and against various school officials in both their official and individual capacities, alleging that plaintiff, a public school teacher, had been denied renewal of her employment contract because of her exercise of rights protected by the First Amendment. Plaintiff sought both equitable relief and damages against all defendants. Her complaint stated two causes of action against the School District: one under § 1983, with jurisdiction based on 28 U.S.C. § 1343, and the other directly under the Fourteenth Amendment—patterned after that directly under the Fourth Amendment which this Court recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)—with jurisdiction based on 28 U.S.C. § 1331.

The district court dismissed the action against the School District prior to trial, holding that the School District is not a "person" suable under § 1983, and that the cause of action asserted against the School District directly under the Fourteenth Amendment could not be maintained because the School District enjoys the State's immunity under the Eleventh Amendment. Pet. App. B-1 to B-2. It is not clear from the district court's opinion whether it also adopt-

ed the School District's alternative argument that there is no *"Bivens"* cause of action under the Fourteenth Amendment against municipalities.[2]

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[2] The district court explained its dismissal of the action against the School District as follows (Pet. App. B-2):

> The action against the Lowell School District 71 must be dismissed. The school district is a municipal corporation and not a "person" under Section 1983 for purposes of either equitable relief or damages. *City of Kenosha* v. *Bruno*, ... U.S. ....., 37 L.ed.2d 109, 116 (1973); *Vanderzanden* v. *Lowell School District No. 71*, Civil No. 72-377 (D. Or. Sept. 5, 1973).
>
> Plaintiff also contends that the Court has jurisdiction under 28 U.S.C. § 1331 because her claim arises under the Constitution of the United States. The school district, however, is immune from suit under that statute. A state cannot be sued unless it expressly waives its Eleventh Amendment sovereign immunity. A school district is a political subdivision of the state. *Vendrell* v. *School District No. 26C, Malheur County*, 226 Or. 263, 360 P.2d 282 (1961). Plaintiff contends that the State of Oregon and defendant school district have waived their immunity. But ORS 30.320, the section which applies to this action, only waives the sovereign's immunity from suit in its own courts and does not waive the State's immunity under the Eleventh Amendment. *Waggoner* v. *Linn County School District No. 42*, Civil No. 73-251 (D. Or. Aug. 16, 1973); *DeLong Corp.* v. *Oregon State Highway Commission*, 233 F.Supp. 7 (D. Or. 1964).
>
> Plaintiff has failed to state a cause of action against the school district under 42 U.S.C. § 1983, 28 U.S.C. § 1343, or 28 U.S.C. § 1331.

The last-quoted paragraph of this opinion is ambiguous. It may simply be a summation of the court's prior holdings (in the case of the Fourteenth Amendment claim, that the Eleventh Amendment precluded it), or it may be a separate and independent adoption of the School District's alternative contention that there is no *"Bivens"* cause of action against municipalities under the Fourteenth Amendment. The Court of Appeals' opinion does not indicate what it understood the district court to have held.

The case proceeded to trial against the remaining defendants, but the district court granted the defendants' Rule 41(b) motion at the close of the plaintiffs' case, holding that plaintiff had introduced no evidence that the nonrenewal of her contract had been motivated by her activities protected by the First Amendment. Pet. App. B-6. The case was thus dismissed in its entirety. Pet. App. B-8.

Plaintiff appealed from both the pre-trial dismissal of her action against the School District and the Rule 41(b) disposition of her action against the remaining defendants. With respect to the first issue, plaintiff did not seek review of the district court's holding that the School District is not a "person" suable under § 1983, but only of the district court's dismissal of her alternative cause of action directly under the Fourteenth Amendment. In their brief to the court of appeals, defendants argued that the dismissal of this cause of action was proper because of the Eleventh Amendment bar, and also because there is no *"Bivens"* cause of action under the Fourteenth Amendment against municipalities.

The court of appeals reversed, and remanded for "further proceedings consistent with this opinion." The court found that plaintiff *had* introduced evidence of illegal motivation which precluded the granting of a Rule 41(b) motion. Pet. App. A-4 to A-5. And the court reversed the dismissal of the School District with the following analysis (Pet. App. A-3 to A-4):

> After the dismissal of School District from the action and after the order of the District Court directing a verdict in favor of all of the individual Defendants-Appellees, this Court in other cases made two rulings which are dispositive of this appeal. Those two rulings compel the reversal on this appeal of the order dismissing the action as to the Defendant-Appellee School District . . .
>
> Our Court in *Hutchison* v. *Lake Oswego School District No. 7*, 519 F.2d [961] (1975) (vacated on other

grounds) ..... U.S. ..... (1977), held that a money judgment for a past wrongful act could be imposed against an Oregon School District and that the Eleventh Amendment does not prohibit such money judgment. Our Court in so holding pointed out that such a judgment against an Oregon School District imposed no liability on the part of the State of Oregon to pay any part of such judgment for the reason that an Oregon School District has the power to sue and be sued and the power to tax and that the only obligation of the State of Oregon to an Oregon School District is the obligation to pay to the district an amount based upon the number of resident students and that such amount may not be an offset to the school district's own tax levy. In the case now before us we are concerned with an Oregon School District. Plaintiff-Appellant asserts her claim for recovery against School District under the Fourteenth Amendment for violation of her First Amendment rights, with jurisdiction under Title 28 U.S.C. § 1331, and in Title 42, U.S.C. § 1983. School District is not immune from such an action. *Mt. Healthy City School District Board of Education* v. *Doyle*, ... U.S. ..... (No. 75-1278, Jan. 11, 1977), part III of the opinion, pp. ..... to ..... (slip op., pp. 5-6). *Gray* v. *Union County Intermediate Education District*, 520 F.2d 803 (9th Cir. 1975). Under the doctrines of *Hutchison and Gray*, the trial judge erred in dismissing the action against School District.

It is by no means clear from the foregoing that the Court of Appeals actually considered or decided the "*Bivens*" issue;[3] certainly, the court's opinion contains no

[3] There is nothing on the face of the court's opinion indicating that it recognized the "*Bivens*" issue to be before it, let alone that it was deciding it. Nor do the cases cited in the opinion relate to the issue. *Hutchison* and Part III of *Mt. Healthy* relate only to the Eleventh Amendment. *Gray* relates only to the question of *jurisdiction* under § 1331, and as petitioner herein recognizes (Pet. 4): "The Court in *Gray* was apparently not asked to decide whether the complaint stated a claim for which relief could be granted against the school district." If the court *were* deciding the "*Bivens*" issue *sub silentio* it is difficult to believe it would have cited only Part III of *Mt. Healthy*, which discussed the Eleventh Amendment, and not Part II, which discussed the "*Bivens*" issue.

In arguing that the court of appeals *did* decide the *Bivens* issue, petitioner reasons as follows: the court of appeals declared that "the trial judge erred in dismissing the action against School District" (Pet. App. A-4), in the face of a brief urging affirmance on both the Eleventh Amendment and no-*Bivens*-cause-of-action grounds; therefore the court of appeals must have inferentially rejected the latter contention. That is a possible construction of the opinion below. But it is also possible that the court below understood the district court to have dismissed the action against the School District solely on the basis of the Eleventh Amendment, see note 2 *supra*, and that by reversing the Eleventh Amendment ruling and remanding for "further proceedings consistent with this opinion" (Pet. App. A-5) the court of appeals did not intend to resolve claims which had not yet been addressed by the district court.

analysis if it *was* deciding it. But even if the opinion could be construed as having resolved the issue in plaintiff's favor *sub silentio*, and even if this Court were willing to consider an "extremely important" legal issue in the absence of an articulated opinion by either lower court, there are several reasons why it should not do so here.

2. *Now Is Not the Appropriate Time for This Court To Consider the* "Bivens" *Issue.*

a. The "*Bivens*" issue, while straightforward in terms of practical effect, is one which this Court should not consider until the myriad materials that potentially bear on its resolution have been adequately unearthed and developed by the lower courts. Proper resolution of the issue depends upon sifting more than a century of legislative history and judicial developments, and that process has only recently begun in the lower courts. Each new lower court decision has uncovered additional historical evidence which bears on the issue, and each decision has furnished new insights

into the considerations which bear upon its resolution.[4] A definitive resolution by this Court at this time would pretermit this evolving process of scholarship and analysis at an early stage. On an issue as potentially important as whether the Fourteenth Amendment creates a cause of action against municipalities, this Court should not run the risk, which at this point might be substantial, of a decision that is inadequately informed. A further period of time in which lawyers in additional cases can research and brief the issue in the lower courts, and judges can assess the mountain of relevant historical materials that is being uncovered, will serve to sharpen and crystalize the issue, providing this Court an opportunity to decide this "extremely important question" (*Mt. Healthy*, 429 U.S. at 278) with greater assurance that it has before it all of the "evidence" pertinent to its resolution.

b. Moreover, it is possible that developments in the near future will render the *"Bivens"* issue less "important" than this Court perceived it to be in *Mt. Healthy*. As a practical matter, the issue is important only if there is no means to secure relief from municipalities under § 1983, whether in the form of an order against the municipality itself or against officials in their official capacities. If this

[4] A number of courts of appeals have held that there is a cause of action against municipalities directly under the Fourteenth Amendment on the authority of *Bivens*, without independent analysis. The only decisions to consider the arguably distinguishing factors present when a municipality is the defendant are *Brault* v. *Town of Milton*, 527 F.2d 730 (2d. Cir. 1975), vacated on other grounds, 527 F.2d 736 (2d Cir. 1975) (en banc); *Kostka* v. *Hogg*, 560 F.2d 37 (1st Cir. 1977); *Gagliardi* v. *Flint*, 564 F.2d 112, 117-126 (3rd Cir. 1977) (concurring opinion of Gibbons, J.); *Mahone* v. *Waddle*, 564 F.2d 1018, 1030-37 (3rd. Cir. 1977) (dictum); *id.* at 1037-62 (opinion of Garth, J., concurring in part and dissenting in part). Each of these decisions cites historical evidence and provides insights not contained in the decisions preceding it.

Court decides *Monell* in a manner which makes relief against municipalities available under § 1983, the question whether municipalities can also be sued directly under the Fourteenth Amendment will be one of no practical significance. And, regardless of how this Court decides *Monell*, Congress is presently considering whether to enact legislation which would amend § 1983 to expressly declare that all municipalities are "persons"[5]—with hearings scheduled in the Senate for the very week the instant brief is being filed.[6] Enactment of such legislation would leave the *"Bivens"* issue as one this Court would have no particular reason to consider. In the face of active legislative consideration of bills of this nature, it would seem the better course for this Court not to rush to consider the *"Bivens"* issue now.

3. *The Interlocutory Posture of This Case Makes It a Less Than Ideal Vehicle for This Court's Resolution of the* "Bivens" *Issue.*

This case must go back for trial in any event against the other defendants. (No petition has been filed seeking review of *that* ruling by the Court of Appeals.) The course of that trial will not be affected one bit by the presence or absence of the School District as an additional defendant. The School District has furnished its regular lawyer to represent the other defendants—indeed, even after the School District was dismissd by the district court before trial, its lawyer continued to represent the remaining defendants at the trial—so that the School District's presence as a defendant will impose no additional legal costs upon it. The evidence to be introduced upon remand will not vary one bit depending upon the presence or absence of the

[5] Bills to that effect are pending as S. 35; H.R. 4514.

[6] Before the Subcommittee on Citizen and Shareholder Rights and Interests of the Senate Judiciary Committee.

School District as a defendant. Thus the School District will be subjected to no additional expense if it is required to defend further without a definitive ruling from this Court. Most important, it is unlikely that the determination one way or the other of the *"Bivens"* issue, will affect the ultimate outcome of the case.[7] And, of course, if that unlikely event *should* occur, the School District would be able to seek review of the *Bivens* issue at that time.

In a case where the issue thus is likely to prove of little or no practical significance, it would be particularly unfair to have consideration of the issue by this Court further delay plaintiff's access to the remedies she seeks for the wrongs she has suffered. As there must be a trial in any event, plaintiff should be allowed to proceed to that trial and to obtain the remedies to which she would be entitled from the other defendants irrespective of the resolution of the *"Bivens"* issue. That issue can be considered later, in the unlikely event it becomes determinative of plaintiff's access to any of the relief awarded.

B. *The Court Should Not "Hold" the Petition Herein Pending Decision in* Monell

There is no reason for this Court to "hold" the petition herein pending decision in *Monell*, for however that case is decided there must inevitably be a trial of the instant case

[7] Plaintiff may lose on the merits. Plaintiff may win on the merits, and secure complete satisfaction of the judgment from the other defendants, rendering the issue moot. (This is the likeliest outcome, for it is common for school districts voluntarily to pay judgments entered against school officials. While we do not *know* that that would happen here, the fact that the School District continued to furnish counsel to the officials after it was dismissed from the case suggests that it would.) Only if satisfaction of the judgment ultimately depended upon collecting from the School District as an entity would the *"Bivens"* issue be significant in this case, and in that event the issue can be aired and decided at that time.

in the district court, and the lessons of *Monell*, if relevant, can be implemented below when it issues. If this Court rules in *Monell* that school districts are "persons" suable under § 1983, plaintiff will surely be able to reassert her § 1983 cause of action against the School District. And if this court holds to the contrary in *Monell*, plaintiff's rights against the School District will depend upon her *"Bivens"* cause of action, whose viability we have already shown should not be decided by the Court in this case at this time.

Plaintiff is understandably anxious to proceed to the trial to which she is indisputably entitled, and her path to securing the remedies due—whatever they may be—should not be lengthened by delays irrelevant to the ultimate disposition of this case.

II. The Eleventh Amendment Issue

The other issue which petitioner asks this Court to decide is whether Oregon school districts enjoy Eleventh Amendment immunity. That issue does not warrant this Court's attention. The Ninth Circuit had ruled, prior to *Mt. Healthy*, that Oregon school districts are not the "State" for Eleventh Amendment purposes, on an analysis which correctly anticipated the controlling standards announced by this Court in *Mt. Healthy. Hutchison* v. *Lake Oswego School District No. 7*, 519 F.2d 961 (1975), vacated on other grounds, 429 U.S. 1033 (1977). In the instant case, decided after *Mt. Healthy*, the Ninth Circuit reaffirmed its holding in *Hutchison*, citing *Mt. Healthy* as authority for its action. Pet. App. A-3 to A-4.

Petitioner offers nothing which would distinguish this case from *Mt. Healthy*. Its lone point is that the Oregon Supreme Court has ruled that Oregon school districts enjoy sovereign immunity as a matter of *state* law. But that was equally true of the Ohio school district involved in *Mt. Healthy*, and the petitioner there made precisely the same

argument (that the State's investiture of school districts with sovereign immunity controls the Eleventh Amendment question). See Brief for Petitioner in *Mt. Healthy*, pp. 26-31. Thus the decision below is entirely consistent with this Court's holding that Ohio school districts do not enjoy Eleventh Amendment immunity.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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